89-315

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

MICHAEL S. ROBERTSON

V.

GASTON SNOW & ELY BARTLETT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

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QUESTION PRESENTED

1. When counsel was denied the right to make any final argument before the state court judge's decision, was there a *per se* violation of the Due Process Clause of the Fourteenth Amendment entitling the plaintiff to a new trial?[1]

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[1] "...[T]he caption of the case in this Court contains the names of all the parties." Rule 21.1 (b).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Petitioner, Michael S. Robertson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts, originally entered on April 6, 1989, on which a duly filed Petition For Rehearing was then denied on May 22, 1989.

OPINION BELOW

The opinion of the Massachusetts Supreme Judicial Court is reported at 404 Mass. 515,____ N.E. 2d_____ (1989), and a copy of the opinion appears in the separately presented Appendix hereto, pages 1-30.[2]

JURISDICTION

The Massachusetts Supreme Judicial Court denied petitioner's timely-filed petition for rehearing on May 22, 1989 (App. 35-53), after its original judgment and opinion were entered on April 6, 1989 (App. 1), so this petition is timely filed, in accordance with the provisions of Rule 20.4. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), as petitioner claims that the judgment and

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[2]The Appendix will hereinafter be cited as "App.___", and because it is relatively "voluminous", is "separately presented", as per Rule 21.1 (K).

opinion of the highest court of the Commonwealth of Massachusetts deprive him of his rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States of America.

CONSTITUTIONAL PROVISION

Section 1 of Amendment XIV to the Constitution of the United States of America -

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. 14 Stat. 358; 15 Stat. 706-707.

STATEMENT OF THE CASE

On October 21, 1985, after nine days of trial, a Massachusetts Superior Court jury returned a verdict for the plaintiff

for $500,000 on both the legal malpractice and misrepresentation counts against the defendant law firm.[3] The law firm filed a motion for a new trial, essentially based upon the insufficiency of the evidence, and eight months later--and then only after a mandamus action was threatened by the plaintiff against the trial judge--he allowed the defendant's motion for a new trial because the jury verdicts "are against the weight of the evidence" and "to prevent a failure of justice." The parties agreed to waive jury and have the retrial be on the basis of the jury trial transcript and exhibits, and that was done, the parties submitting detailed requests for findings and rulings to the judge in January, 1987.

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[3]As is the usual Massachusetts custom, a consumer protection count, under Massachusetts General Laws Chapter 93A, was simultaneously tried non-jury to the judge, he to make later findings and rulings on that action.

As had been specifically agreed to as a condition to proceed "jury-waived", and as was specified in correspondence of the trial judge and counsel, the only thing then left to be done before the court's decision was the scheduling of "final argument" of counsel. Wonderously, however, without any further word from or contact with the trial judge, and without allowing counsel to make final arguments, on March 18, 1987, the trial judge filed his findings and rulings finding for the defendant law firm on both counts.

Procedures Raising The Question Presented

A week later the plaintiff filed a Motion For A New Trial Or Other Appropriate Relief, which in the part relevant to the question presented said:

> [T]he court's decision and Order for judgment of March 18, 1987, constitutes such fundamental error that no procedural remedy

now exists, regretably, post-judgment, short of vacating judgment and reassigning the case to another justice for a new trial, in accordance with the provisions of M.R.Civ.P. 59. The plaintiff has, surprisingly, been denied the fundamental due process right of counsel to be heard in final argument before the case is decided--a right recognized and established, incidentally, in M.R.Civ.P. 51(a). Only a new trial before another justice can now remedy that constitutional error. Obviously, that necessary element of any meaningful working of the adversarial process cannot now be resurrected without a new trial before another justice. It would require godlike powers for this court to erase its existing findings and rulings. Any ex post facto argument would be but a pro forma exercise. Sadly, the genie is out of the bottle. Argument now can neither do justice nor construct the equally important appearance of justice. The mirror is cracked.

* * *

The initial specified constitutional error would seem so patent that hearing thereon should be unnecessary. The court might await defendant's response hereto (but a vitiating reposte seems nonexistent), but reassignment to one of the other two judges agreed upon by the parties in the initial

> Joint Request For Special Assignment for the new trial would seem, unarguably, the procedure now mandated.

The plaintiff also submitted supplemental requests for altered findings and rulings, denominating such alternative relief as "remedy...deemed so insufficient [given the "constitutional error"] it is here proposed only for appellate record purposes", the court heard counsel argue for the additional or altered factual findings, and on June 30, 1987, the judge entered a Memorandum and Order [App. 31-32] (the only document containing any trial court order or reference to the new trial sought because of the unconstitutional denial of the plaintiff's right to make final argument). In its relevant part, all it said was:

> I am not persuaded that there is any basis for another new trial. The plaintiff points to no authority which would suggest a contrary result.

> The motion for new trial is DENIED. Judgment is to enter for the defendants.

Plaintiff duly appealed, and the fourth Issue Presented in his brief (the first three relating to the substantive errors presented) was:

> 4. If the first three issues should, somehow, result in affirmances of the trial court actions, must, at least, a third trial be ordered, because the trial judge at the second trial committed constitutional error when he decided the case without permitting counsel to address the court in final argument?

The issue was briefed by the parties,[4] argued on January 4, 1989, and on April 6, 1989, the Massachusetts Supreme Judicial Court handed down its opinion and judgment affirming the judgment for the defendant below. (App. 33-34). The court's

[4]This Court's opinions cited, infra, were cited in plaintiff's briefs and equally supportive Massachusetts opinions.

opinion acknowledges that the instant constitutional error was duly raised both in the trial court and on appeal (App. 4-6). Only three decisional sentences of the opinion relate to the question presented to this Court, the first two comprising footnote 7 and the third consisting of the penultimate summary sentence of the opinion (App. 26; 30); they say:

> [7]The plaintiff argues on appeal that, "[i]f [Gaston Snow] is not held liable, the court must, at the very least, order a third trial, because the denial of plaintiff's right to make final argument at the...jury-waived trial" violated the plaintiff's right to due process. Without deciding whether the circumstances under which the judge decided the case constituted a deprivation of due process, we conclude that the plaintiff is not entitled to a third trial since our review of the case is, in effect, de novo.
>
> Since the plaintiff has briefed and argued in this court that he is entitled to de novo review, and we have afforded him de novo review, we need not reach the plaintiff's claim that he did not have the opportunity to

present final argument until after the judge had rendered his decision.

On April 19, 1989, the plaintiff duly filed a Petition For Rehearing with the Massachusetts Supreme Judicial Court, mounting as his first ground "The 'per se' constitutional error", and arguing that "[a]t the very least [i.e., if the substantive errors were unavailing], it is simply impossible for the court not to order a new trial." The plaintiff refocused the authorities argued in his briefs (including the decisions of this Court) and added the United States Court of Appeals cases cited infra. On May 22, 1989, the Massachusetts Supreme Judicial Court simply "denied" the Petition For Rehearing (App. 35-53).

That recounts the only two essential facts relevant to the question presented herein: that the plaintiff was denied the right to make final argument before

decision (without waiver and without cause) and that stark error "was timely and properly raised", Rule 21.1(h), in the state court proceedings.[5]

REASONS FOR THE ALLOWANCE OF THE WRIT

In refusing the new trial relief mandated because of the patent denial of due process effected in denying the plaintiff his right to make final argument

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[5] In an excess of caution, although it is immaterial to the procedural error presented herein, the Court should be advised that the Massachusetts Supreme Judicial Court's recounting of the substantive evidence in its opinion "totally ignores most of the plaintiff's compelling evidence [that easily convinced the jury of the defendant's liability]...and unfairly characterizes the evidence it does describe", a disheartening aberration the plaintiff argued in detail to the court in his Peitition For Rehearing (Emphasis in original). For the Court's information, plaintiff's Petition For Rehearing is set out in full in the Appendix, pages 35-53, the court's skewed evidentiary presentation argued in 2. (The letter form of presenting a Petition For Rehearing is required by Massachusetts Rules of Appellate Procedure 27.) This Court is assured that there are no substantive facts lurking in or de hors the record which would in any sense make just or fair the defendant's escaping liability in this case.

the Massachusetts Supreme Judicial Court "has decided a federal question in a way in conflict with applicable decisions of this Court", Rule 17.1(c), and "in conflict with the decision of another state court of last resort or of a federal court of appeals", Rule 17.1(b). In fact, the "conflict" is with every other reported decision--there is no authority to support this aberrational state court decision.[6] The error is so clear and the rule of constitutional law so settled, plaintiff presumes to suggest that the Court afford him the required relief by utilizing summary disposition: a Memorandum Decision allowing this petition, vacating the judgment and remanding with instructions

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[6]Note, that the Massachusetts Supreme Judicial Court opinion does not assay to cite any supporting authority for its decision on this issue (App. 26), nor could the defendant in its brief to the court. That is not oversight; there, literally, is no authority constructing any prophylactic for this fundamental a constitutional error.

that a new trial be ordered. Accord Trout v. Lehman, 465 U.S. 1056 (1984); Neese v. Southern Railway Company, 350 U.S. 77 (1955). The need for remedy is compelling, but the Court's overburdened time need not be utilized to brief and argue the case only to reiterate established law.

And the law is established. Perhaps the best modern opinion of this Court establishing that "the right to be heard" is a fundamental right included in the Due Process Clause of the Fourteenth Amendment is Powell v. Alabama, 287 U.S. 45 (1932). The Court's ultimate holding was that it was a denial of due process for a state not to appoint counsel in a capital criminal case where the defendants were young, ignorant, and incapable of retaining private counsel, Id. at 71, but the right to have counsel appointed was deduced from the more fundamental due process rights, first established, of "the

assistance of counsel" and "the right to be heard." Without counsel appointed, there was no one to render the mandated "assistance", no one to be "heard." Id. at 67-68; 72. With instant relevance, the Court made it clear that "the right to be heard" by counsel arose out of the civil common law. The Court established that in England, from before 1688, "parties in civil cases and persons accused of misdemeanors were entitled to the full assistance of counsel" and cited an unbroken skein of its own civil opinions and those of state and lower federal courts which all recognized that "the assistance of counsel" and "an opportunity of being heard" "never has been doubted... [to] constitute basic elements of the constitutional requirement of due process of law." Id at 60; 68-70. The Court announced explicitly that this constitutional

process, the right to be "heard"--was due in all cases, saying, on page 69:

> If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense. (Emphasis supplied).

The Court has long recognized that "the right to be heard" in final argument is included in the integument of Due Process fundamental to the factfinding process, be it civil or criminal. For example, the Court said in Hovey v. Elliot, 167 U.S. 409 at 419 (1897):

> If the court had the power to [render a decree as punishment for contempt]...by denying the right to be heard to the defendant, what plainer illustration could there be of taking property of one and giving it to antoher without hearing or without process of law.

See also Windsor v. McVeigh, 93 U.S. 274 277 (1896) (decision of court pronounced

against party without hearing him "is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.")

In Herring v. New York, 422 U.S. 853 (1975), the Court specifically applied this general due process principle to the denial of final argument in a non-jury trial, the exact same situation presented in this case, holding that "[a] New York law conferr[ing] upon every judge in a nonjury criminal trial the power to deny counsel any opportunity to make a summation of the evidence before the rendition of judgment", Id. at 853, was unconstitutional as violative of the Due Process Clause of the Fourteenth Amendment and vacated the judgment. Id. at 865. The Court said, on pages 858-859:

> There can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial....The

> issue has been considered less often in the context of a so-called bench trial. But the overwhelming weight of authority, in both federal and state courts, holds that a total denial of the opportunity for final argument in a nonjury criminal trial is a denial of the basic right of the accused to make his defense.

Nothing, of course, turns constitutionally on the fact that it happened that the Court explicated the precept in Herring in the context of a criminal case. Implicit throughout its Herring opinion, and echoing Powell, is the Court's recognition that it is but making a discrete application of a fundamental general principle of justice: "the traditions of the adversary fact-finding process"; "the adversary system's commitment to argument"; "summation of the evidence at the close of trial"; "a criminal trial...is in the end basically a fact-finding process"; "there can be no justification for a statute that empowers a trial judge to deny absolutely the opportunity

for any closing summation at all." Id. at 857, 860-863.[7]

There remains only to dispose of the Supreme Judicial Court's baseless mechanism to avoid recognition of the unarguable constitutional error when there is "a total denial of the opportunity for final argument." Herring v. New York, supra, 859. The court held, in one sentence of a

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[7] Ironically, one of the leading state cases recognizing that civil litigants have a constitutional right to final argument was a decision of the Massachusetts Supreme Judicial Court itself--seven years even before Powell v. Alabama, supra. In Pizer v. Hunt, 253 Mass. 321, 148 N.E. 801 (1925), the court said, on page 322:

> The defendant has cited numerous decisions of the Supreme Court of the United States to the effect that State courts cannot enter judgment without giving parties an opportunity to be heard, and that such action amounts to deprivation of property without due process of law, or infringement of equal protection of the law in violation of rights secured by the Fourteenth Amendment to the Constitution of the United States.(8 citations omitted)...Of course we accept the principles declared in these decisions in all their amplitude.

Pizer was, of course, prominently relied upon by this petitioner in his Supreme Judicial Court briefs.

footnote and with no citation of authority: "...we conclude that the plaintiff is not entitled to a third trial since our review of the case is, in effect, de novo" (App. 26, n. 7)[8] That is a totally invalid basis to avoid the new trial, however, a ploy--as a matter of established constitutional law.[9] The Herring holding is that the denial of the right to final argument is so

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[8]The plaintiff had argued to the court that under the established Massachusetts standard of appellate review of a nonjury decision, when the evidence is wholly documentary, as it was here, the "clearly erroneous" standard to reverse the trial judge is replaced by a de novo review by the appellate court. Without even accepting that de novo review was required, in the sentence to which this quoted footnote is the footnote, the court simply held that "even if we apply the de novo standard, we reach the same conclusions as the trial judge" (App. 25-26).

[9]It also, of course, flies in the face of the logic and common sense upon which the rule of law is grounded: had the plaintiff been accorded the right to make final argument to which he was constitutionally entitled, he may have prevailed at trial and never have had to run the gauntlet of any appellate review, or at least with the burden of reversal on the defendant.

fundamental a violation of due process that it is per se reversible error. (It was exactly that aspect of the holding that prompted then Mr. Justice Renhquist to dissent in Herring, joined by The Chief Justice and Mr. Justice Blackmun saying that: such due process errors should be assessed on a "case-by-case approach." Id. at 865-872.) It is established "black letter law" that denial of final argument is a per se constitutional error--nothing may thereafter sanitize or dissolve it--and "no matter how strong the case for the prosecution may appear to the presiding judge", as this Court said in Herring, at 858. United States v. Spears, 671 F.2d 991, 992, 994 (7th Cir. 1982) (given "Herring's emphasis upon the fundamental nature of the constitutional right of summation", "the Supreme Court held that it is per se reversible error"); Patty v. BordenKircher, 603 F.2d 587, 589 (6th Cir.

1979) (a new trial is required "no matter how strong the case" "may appear." "This is a per se rule.... The District Court erred, therefore, in applying the harmless error rule of Chapman v. California); Spence v. State, 463 A. 2d 808, 812 (Md. 1983) ("Depriving [a party] of this opportunity ["to argue before verdict"]... denies him a fair trial....It is clear if counsel must argue...after the verdict is announced, counsel will truly be 'whistling in the wind'.")[10]

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[10]Here, plaintiff's counsel used the metaphor, "Sadly, the genie is out of the bottle" in his motion for a new trial to the trial judge (App. 35-53).

Although, as demonstrated, it is legally immaterial, wisdom dictates that correction be made of a mischaracterization of the "oral argument" counsel made to the trial judge after his decision. In, supposedly, stating the facts, the state court opinion says, that after plaintiff filed his motion for a new trial because "the judge issued his decision without first giving the parties the opportunity for final argument [,t]he judge then scheduled a hearing at which both parties presented oral argument...." (App. 4-5) The implication is that that ex post facto "oral argument" comprehensively addressed all the issues. That is not true at all, as the plaintiff explained to the court in his Petition For Rehearing (App. 35-53, n. 1): only "the narrow matter of additions to and alterations of the court's findings and rulings....[were] addressed at the later 'oral argument'," although it was already constitutionally too late for any argument.

Ironically, again, one of the more scholarly recent state court decisions firmly holding that the denial of final argument is per se reversible constitutional error is the Massachusetts intermediate appellate court decision in Commonwealth v. Miranda, 22 Mass. App. Ct. 10, 490 NE 2d, 1195 (1986). The opinion collects an array of federal and state authorities for the uniformly established rule, recognizes, on page 13, that the error is "irremedial", and concludes, on pages 22-23:

> It is generally accepted, as discussed earlier, that prejudice as a result of the denial of closing arguments is assumed; and that such denial never can be harmless error. As a result, we are precluded from concluding, on the basis of the trial judge's own say-so, that argument would in all likelihood have left him where it found him. Rather, having concluded that the judge's action amounted to a denial of the right, we are constrained to hold that the defendant was denied 'the basic right...to make his defense.' For us to conclude that this denial did not create a substantial likelihood of a miscarriage of justice would be, in effect, to

> reject the importance assigned to the right by the Herring decision (Emphasis supplied).

As the error is "per se", "irremedial", "never can be harmless error", the error can also not be erased by an appellate de novo review--even were it impeccably fair.

One cannot but stand in puzzled wonder at the Massachusetts Supreme Judicial Court's unexplained refusal to recognize the unarguably per se reversible constitutional error committed in this case. This Court should not permit this patent injustice to stand. This petition presents three of the "reasons that will be considered" to grant the writ, as specified in Rule 17.1(b) and (c). There is in this case simply no reason for the Court to demer, and summary disposition is perfectly appropriate.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue and at the same time the Court should summarily reverse the judgment of the Massachusetts Supreme Judicial Court and remand with instructions to order that the plaintiff have a new trial.

Respectfully submitted,

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DATED: August 18, 1989